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No. 85-1458

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

JAMES E. PETERSON,

Petitioner,

v.

HAROLD M. KENNEDY, RICHARD A. BERTHELSEN, and NATIONAL FOOTBALL LEAGUE PLAYERS ASSOCIATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the court of appeals properly held that an employee, who claims his collective bargaining grievance was mishandled, cannot maintain a state tort damage claim for negligence against the union's attorneys, but rather, can recover damages under federal law only against his union for breach of the duty of fair representation.

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BRIEF IN OPPOSITION

Respondents, Harold M. Kennedy, Richard A. Berthelsen and the National Football League Players Association, AFL-CIO, ("NFLPA"), oppose the granting of the Petition for a Writ of Certiorari for the reasons set forth below.

COUNTERSTATEMENT

The relevant facts are set forth fully in Appendix A to the Petition (A-1—A-7).

The Ninth Circuit unanimously affirmed the orders of the District Court which (a) dismissed Peterson's claim

against Harold Kennedy for want of personal jurisdiction; (b) dismissed the professional negligence claim against NFLPA in-house staff counsel Richard A. Berthelsen on the grounds that the claim was "subsumed" in Peterson's duty of fair representation claim against the Union; and (c) granted judgment NOV for NFLPA because Peterson had failed to establish a breach of that duty.[1] The instant Petition seeks review of that portion of the court of appeals' decision which holds that full-time union employees who are attorneys cannot be held personally liable for damages for asserted acts of negligence when assisting bargaining unit members in grievance proceedings. The court below unanimously concluded that in such situations the disappointed grievants' remedy was against the union for breach of the duty of fair representation and that, here, the evidence offered by Peterson fell short of establishing any breach of that duty.

REASONS FOR DENYING THE PETITION

THE PETITION DOES NOT EVEN PURPORT TO PRESENT A CIRCUIT CONFLICT, A CONFLICT WITH ANY PRIOR DECISION OF THIS COURT OR ANY IMPORTANT UNSETTLED QUESTION OF FEDERAL LAW

Rule 17 of the Rules of this Court explicitly provides that certiorari will be granted only when special and important reasons are established, such as where the de-

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[1] The panel issued two opinions. The principal opinion, authored by Circuit Judge Reinhardt, who was joined by Judge Goodwin, addressed all the issues raised on appeal. Circuit Judge Wiggins filed a special concurring opinion, embracing fully the reasoning of the principal opinion as to all but one issue. Judge Wiggins wrote separately because he did not agree with certain dicta in the panel's principal opinion which would have extended the immunity of union attorneys beyond the facts presented by the instant case. As shown hereafter, Judge Wiggins agreed completely that Peterson's claims against Berthelsen had been properly dismissed.

cision below is in conflict with a decision of another circuit, or in conflict with this Court's prior decisions or involves an important, unsettled matter of federal law. Petitioner has not even attempted to satisfy any of these criteria. Because the decision below is not in conflict with the decisions of this Court or other circuits, but rather, is fully consistent with this Court's prior decisions, the Petition should be denied.

1. There is no circuit conflict. Petitioner does not cite a single decision from outside the Ninth Circuit which even purportedly is in conflict with the decision below. Rather, the only authority which Petitioner contends is in conflict with the instant case is another Ninth Circuit decision, *Aragon v. Federated Department Stores, Inc.*, 750 F.2d 1447 (9th Cir. 1985), which involved a negligence claim by a union member against an outside law firm hired by a union. Both the principal and concurring opinions issued below considered the *Aragon* case, distinguished it factually and legally, and held that affirmance here was nevertheless required (A-23-24; A-34-36). Whether an intra-circuit conflict exists is not a matter for this Court to settle, but rather, for the Ninth Circuit to resolve. The Ninth Circuit, however, has obviously rejected the notion of any conflict between the panel decision here and *Aragon* because it denied Peterson's request for rehearing *en banc* which relied exclusively on that argument (B-1).

2. Petitioner's claim of legal malpractice is subsumed in, and precluded by, the breach of duty claim asserted against the union. To prevail on a tort claim for legal malpractice against the Union's attorneys, Petitioner would have to prove that the filing of an injury grievance rather than a non-injury grievance constituted professional negligence, and that if such a non-injury grievance had been timely filed, it would have been meritorious. Since resolution of such a claim would be "substantially dependent upon analysis of the terms of an agree-

ment made between the parties in a labor contract," *Allis-Chalmers Corp. v. Lueck*, —— U.S. ——, 105 S.Ct. 1904, 1916 (1985), the claim is necessarily governed by federal law. Here, as in *Lueck*, "interests in interpretive uniformity and predictability" require that the dispute be "resolved by reference to federal law;" that is so "whether such questions arise in the context of a suit for breach of contract or *in a suit alleging liability in tort.*" *Id.* at 1911 (emphasis added).

Allis-Chalmers Corp. v. Lueck also confirms the correctness of the lower courts' view that Petitioner's "malpractice claim against the union attorney was 'subsumed' in and precluded by the breach of duty claim asserted against the union." (A-15). Because the negligence asserted here indisputably involved the exercise of judgment by "union attorneys [who] were required to construe the scope and meaning of the injury and non-injury grievance provisions of the collective bargaining agreement and to determine which of the two grievance procedures was more appropriate" (A-14), there can be little doubt that Petitioner's state law claim was "inextricably intertwined" (105 S.Ct. at 1912) with the collective bargaining agreement and was, therefore, preempted under *Allis-Chalmers Corp. v. Lueck.*

3. The decision below is fully consistent with federal labor policy and prior decisions of this Court. In *Atkinson v. Sinclair Refining Co.*, 370 U.S. 238 (1962), this Court held that individual damage claims could not be maintained against union officials for their actions on behalf of the union. The historical basis for that determination, which the Ninth Circuit quoted here (A-17), is as follows:

> When Congress passed § 301, it declared its view that only the union was to be made to respond for union wrongs, and that the union members were not to be subject to levy. Section 301(b) has three clauses. One makes unions suable in the courts of

> the United States. Another makes unions bound by the acts of their agents according to conventional principles of agency law (cf. § 301(e)). At the same time, however, the remaining clause exempts agents and members from personal liability for judgments against the union (apparently even when the union is without assets to pay the judgment). The legislative history of § 301(b) makes it clear that this third clause was a deeply felt congressional reaction against the Danbury Hatters case (*Loewe v. Lawlor*, 208 U.S. 274; *Lawlor v. Loewe*, 235 U.S. 522), and an expression of legislative determination that the aftermath (*Loewe v. Savings Bank of Danbury*, 236 F. 444 (C.A. 2d Cir.)) of that decision was not to be permitted to recur. 370 U.S. at 247-48.

This policy was recently reiterated in *Complete Auto Transit, Inc. v. Reis*, 451 U.S. 401 (1981), where individual union officers and members were found to be immune from damage liability even where their actions were not authorized by the union and were in violation of a collective bargaining agreement.

Circuit Judge Wiggins unequivocally joined Circuit Judges Goodwin and Reinhardt in holding that *Atkinson* required dismissal of Peterson's claims against NFLPA's staff attorneys. Thus, in his concurring opinion, Judge Wiggins stated:

> The attorney, Berthelsen, was at all relevant times an employee of the union. As a union-employed attorney, he should not ordinarily be liable personally to a union member for actions relating to the union's representation responsibilities. In such a case, the reason behind the rule in *Atkinson* demands that liability be fixed on the union itself. Moreover, the union's liability for the conduct of its attorney-employee would be judged against a standard of arbitrary or discriminatory conduct or conduct amounting to bad faith and would be determined in

> a federal cause of action under Section 301. *See Vaca v. Sipes*, 386 U.S. 171, 187-88 (1967).
>
> I do not challenge the application of these rules to the instant case. Those historical reasons that moved Congress to enact section 301(b) freeing union officials from liability for conduct undertaken on behalf of the union or any of its members in furtherance of the representational responsibilities of the union, are described in *Atkinson*, 370 U.S. at 247-249. The present facts accord with the reason for the rule stated in *Atkinson*. Berthelsen was a full-time employee. If such an employee, simply because his normal responsibilities required that he act as an attorney for a union member, were to be exposed to the full measure of personal liability for his ordinary negligence, the history of *Danbury Hatters* would be repeated. As *Atkinson* records, it was to avoid a recurrence of the *Danbury Hatters* case that section 301(b) was enacted. (A-30-31, footnote omitted).

Accordingly, the decision below, as reflected by both the principal and concurring opinions, is fully consistent with established federal labor policy as articulated in this Court's prior decisions.

4. This Court does not grant certiorari to resolve factual issues or make evidentiary determinations. All four judges below—District Judge Nielson and Circuit Judges Goodwin, Reinhardt and Wiggins—concluded that, even if the evidence were construed most favorably for him, Peterson had nevertheless failed to show that NFLPA's conduct was "arbitrary, discriminatory, or in bad faith," *Vaca v. Sipes*, 386 U.S. at 190, and therefore, a breach of the duty of fair representation. In part B of his Petition, Peterson challenges that determination, asserting that "the Ninth Circuit ignored substantial evidence" and "erroneously focused on counsel's 'judgment call' " when it concluded that NFLPA had not breached its duty to Peterson. (Petition at 10). Questions involving the sufficiency of the evidence and validity of factual deter-

minations are not matters which this Court reviews on certiorari. *Boag v. MacDougall*, 454 U.S. 364, 367-68 (1982) (Rehnquist, J., dissenting); *Graver Tank & Mfg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949); *Webre Steib Co. v. Commissioner*, 324 U.S. 164, 173 (1945); *Just v. Chambers*, 312 U.S. 383, 385 (1941); *Chicago, R.I.&P. Ry. Co. v. Devine*, 239 U.S. 52 (1915).

CONCLUSION

This Petition does not even purport to satisfy any of the rigorous standards contained in Rule 17, Sup. Ct. Rules, for the granting of certiorari. For the reasons apparent on the face of the Petition itself and for the reasons stated herein, the Petition should be denied.

Respectfully submitted,

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